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No. _____

Supreme Court of the United States

October Term 1991

THE CIT GROUP/EQUIPMENT FINANCING INC., NELSON G. EVENSON, ELFRIEDA EVENSON, JAMES A. BRUNDAHL, BERNADETTE BRUNDAHL,

Petitioners,

v.

VILLAGE OF GERMANTOWN, WISCONSIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WISCONSIN

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Did Germantown violate the Fourteenth Amendment due process clause by levying special assessments to pay for the cost of building reserve capacity into an interceptor sewer where assessments were levied on benefited properties in unknown and unlimited amounts and where the total assessment is unknown and unlimited and where the total amount of the assessments levied is expected to vastly exceed Germantown's only calculation of the cost of building the reserve capacity?

PARTIES TO THE PROCEEDING

The names of all parties appear in the caption of the case. The parent company of The CIT Group/Equipment Financing Inc. is The CIT Group Holdings, Inc.

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JURISDICTIONAL STATEMENT

The Wisconsin Court of Appeals decision was entered May 22, 1991. The Wisconsin Supreme Court denied discretionary review on October 8, 1991. 28 U.S.C. §1257 gives this Court jurisdiction because the Wisconsin Court of Appeals decision renders Section 66.60, Wis. Stats. unconstitutional as applied to Petitioners. 28 U.S.C. §2403(b) may be applicable.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

U.S. Const. amend. XIV, §1:

"... nor shall any state deprive any person life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The following are printed in the Appendix:

Wis. Stats. §§66.60(1)-(3)

Wis. Stats. §66.60(11)

Wis. Stats. §66.60(12)(e)

Wis. Stats. §66.60(15)

Wis. Stats. §144.24(4)(b)3.

NR 128.06(2), Wis.Adm.Code

NR 128.07, Wis.Adm.Code

Germantown, WI, Resolution 11-88 (March 21, 1988).

STATEMENT OF THE CASE

A. RAISING OF FEDERAL QUESTIONS IN THE TRIAL COURT AND WISCONSIN COURT OF APPEALS

In pleadings, pre-trial and post-trial briefs, Petitioners claimed the assessments were arbitrary, capricious and unreasonable. In Wisconsin such a claim is the equivalent of a claim of unconstitutionality based on a denial of equal protection or due process. Petersen v. Dane County, 136 Wis. 2d 501, 510, 402 N.W.2d 376, 380 (Wis.Ct.App. 1987).

In their brief to the Wisconsin Court of Appeals, pages 44-49 (Appendix 102-115) Petitioners argued that the assessments violated Fourteenth Amendment guarantees of equal protection and due process.

The Wisconsin Court of Appeals decided the merits of the due process and equal protection arguments:

> "Because the assessments were reasonable and fulfill the statutory requirement for an assessment where a municipality proceeds under its police power, there was no taking of property in violation of the Wisconsin Constitution or the United States Constitution. Neither was there a violation of the constitutional equal protection clauses since all future users were similarly treated by the assessment and the assessment had a rational basis."

CIT Group/Equipment Financing, Inc. v. Germantown, 163 Wis. 2d 426, 437-38, 471 N.W. 2d 610, 614 (Wis.Ct.App. 1991).

B. FACTS MATERIAL TO THE QUESTIONS PRESENTED

In 1981, a regional sewerage plan adopted by the Southeastern Wisconsin Regional Planning Commission, Wisconsin Department of Natural Resources ("WDNR") and the United States Environmental Protection Agency required the Village of Germantown, Wisconsin to abandon its existing waste water treatment plant and to build a sewer interceptor linking Germantown to the Milwaukee Metropolitan Sewerage District ("MMSD") with capacity to serve all existing and future users within an area defined as the 2005 Sewer Service Area.

Germantown constructed the interceptor at a total cost of $10,653.967.00. (Trial Court's Findings of Fact, Appendix p. 82).

Germantown sought a Wisconsin Fund Grant from the WDNR to pay for a portion of the cost of the interceptor. Because Wisconsin Fund Grants could not be used to pay for any portion of the cost of building an interceptor with capacity beyond that needed to serve existing sewer users at the time the interceptor would enter service, Germantown had to certify to the WDNR the portion of the cost of the interceptor which represented the cost of building an interceptor with capacity to serve existing users only.

Germantown represented to the WDNR that 93.5% of the total cost of constructing the interceptor represented the cost of building the interceptor without reserve capacity for future users amd that 6.5% of the cost was for reserve capacity. Germantown obtained Wisconsin Fund Grants totaling $5,413,550 to defray

60% of the cost of existing capacity. Germantown levied a police powers special assessment which Germantown expressly designated as an assessment to pay for the cost of building the reserve capacity into the interceptor on all properties not connected to the Germantown sewer system after December 31, 1985. (Trial Court's Findings of Fact, Appendix 83).

On March 21, 1988 Germantown passed a Final Resolution 11-88 to levy the reserve capacity assessments. (Appendix 91). Resolution 11-88 provided that payment of the assessments would be deferred until the property was connected to the sewer system. When a property applied for sewer service, the assessment would be calculated based on the number of residential equivalency connections (REC) for the property. The REC calculation would adjust commercial and industrial

development to an equivalent residential use based on average water consumption of a single family home. The assessment would be $1,000 multiplied by the number of REC's represented by the proposed use of the property as determined by the Village Engineer plus 7% interest after January 1, 1989.

No definition or method of determining the "average water consumption of a single family home" was included in Resolution 11-88 or the report prepared pursuant to §66.60(2), Wis. Stats. The definition of an REC was left to the discretion of the Village Engineer who is to determine the amount of the assessment at the time of an application for service.

Sections 66.60(2) and 66.60(3)(d), Wis. Stats. require that a municipality include in a report a list of the proposed assessments on each property to be

assessed. For properties connected between December 31, 1985 and the date of this report, the list included an assessment in dollars and cents. However, the vast majority of properties affected remained unconnected and for those properties instead of a number in dollars and cents the list contained the word "UNKNOWN". The report projected that the assessments could be expected to be paid at the average rate of 125 REC's per year for 27 years. Neither the Resolution nor the Report limits the collection of assessments to the construction cost nor do they provide a plan for adjusting paid and unpaid assessments when payments have exceeded the construction cost.

The Resolution does not contain a limit on the total number of REC's that can be assessed in the assessment district

and gives no total amount for the special assessments levied.

At trial Germantown's Village Engineer admitted that the properties subject to the assessment could contain up to 8,311 REC's subject to the reserve capacity assessment of $1,000 per REC.

ARGUMENT

I. THE LEVY OF SPECIAL ASSESSMENTS IN UNKNOWN AND UNDETERMINED AMOUNTS DEPRIVES PETITIONERS OF PROPERTY WITHOUT DUE PROCESS OF LAW.

Special assessments are different from general taxes which are levied for general revenue and for general public improvements. Special assessments are levied to pay for specific local improvements which directly benefit certain real properties and may not be

used to raise general revenue without constituting an act of confiscation. The funds raised by special assessments must be used to recover the costs of the work to construct the local improvement. 14 E. McQuillin, The Law of Municipal Corporations, §38.02 (3rd Ed. 1987). "The total amount of the assessment must be no greater than is reasonably necessary to cover the cost of the work." Id. §38.33.

The levy of special assessments is subject to the constraints of the Fourteenth Amendment. Eg., Gast Realty Co. v. Schneider Granite Co., 240 U.S. 55, 58-60 (1916); French v. Barber Asphalt Paving Co., 181 U.S. 324, 339, 345 (1901); Norwood v. Baker, 172 U.S. 269, 279 (1898).

In Nashville, Chattanooga and St. Louis Railway v. Walters, 294 U.S. 405,

assessments for public improvements laid upon particular properties are constitutional if based upon the benefits received by the properties. In Norwood v. Baker, 172 U.S. at 279, this Court held that "the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation." (emphasis in original). Norwood restated the general principle "that the property upon which they are imposed is peculiarly benefitted, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement." Norwood v. Baker, 172 U.S. at 278-79.

The Norwood and French decisions make clear that the levy of special assessments is a legislative act and that the legislative body has wide discretion in determining whether the expense of the local improvement is paid out of the general treasury or from the levy of special assessments against properties specially benefitting from the improvement. If an assessment is made, the legislative body also has wide discretion in defining the territory deemed to be specially benefitted by the public improvement and subject to the special assessment, and wide discretion in fixing the sum to be levied. French 181 U.S. at 339; Norwood, 172 U.S. at 278. This discretion is, nonetheless, restricted by the Fourteenth Amendment's general prohibition against taking private

property without due process of law. French, 181 U.S. at 338-39.

Special assessments are common devices which have long been employed in great numbers throughout the United States to defray costs of municipal improvements. The literature on special assessments in this Court is slender and mostly elderly suggesting that most potential Constitutional issues involving special assessments issues have long been resolved. Germantown, however, managed to throw a new wrinkle into special assessments and raise a constitutional issue by assessing in "unknown" amounts. This is a case of first impression. In every reported special assessment case, the challenged assessment had been determined in dollars and cents. Germantown did not levy assessments in dollars and cents, but levied special

assessments in unknown amounts; the amount of any special assessment is not to be determined until the property owner applies for sewer service, if ever. Germantown's Resolution 11-88 also left also undetermined the total amount of assessments levied. Resolution 11-88 contains no complete formula for calculating the assessments; and, as a result, the only limitation on any individual assessment or the total of all assessments is the Village Engineer's discretionary definition of an REC. Thus, when Resolution 11-88 levied unknown assessments, it also levied assessments without limits.

The fundamental axiom of special assessments is that the first task of the levying authority is to divide up the dollar amount representing the cost of the work or improvement (or the portion of the

cost to be assessed) among those properties specially benefitted by the improvement; the authority must split the bill. Spencer v. Merchant, 125 U.S. 345, 356 (1888); French, 181 U.S. at 338-39. "Splitting the bill" means levying assessments in fixed amounts for all properties assessed, the total of which add up to the cost of the work or the portion of the cost to be assessed.

Germantown failed to perform its fundamental task. It did not determine the cost of the reserve capacity and consequently could not split the cost of the reserve capacity among the benefitted properties. Germantown did not limit the amount of the individual assessments for virtually all properties assessed. Germantown did not limit the total of the assessments levied.

Germantown's failure to split the bill has two consequences which harm Petitioners. First, the levy of an assessment in an unknown amount imposes a lien on benefitted properties in an unknown amount. §66.60(15), Wis. Stats. Because the amount of the lien cannot be known or paid until the property is connected, until the property is connected the property cannot be conveyed with a clear title. Second, because the individual assessments are unknown and the total assessment is unknown, there is no way that anyone, including Germantown, can determine if the assessments levied exceed the cost of the work; Germantown has awarded itself the power to collect assessments without limit.

To fulfill its fundamental task, before the assessments were levied Germantown was required to define the REC,

determine the number of REC's on each property benefitted, total the REC's in the assessment district, then divide the cost of the reserve capacity by the total REC's to arrive at a fixed amount per REC, and finally calculate the amount to be levied on each property based on the number of RECs of the property. Germantown failed to perform every one of these tasks.

In any constitutional special assessment plan, there is an arithmetical check on the legislative action: the dollars and cents total of all assessments levied (added together) must reasonably equate to the dollars and cents cost of the work assessed. The assessing authority is thus easily accountable for the funds raised by special assessment. An instant glance will expose any attempt to use special assessments to raise

general revenue. In this case, Germantown's total assessments should reasonably equal the cost of the reserve capacity. This arithmetical check is impossible here because the assessments are levied in unfixed, undetermined and unlimited amounts.

An example of a municipality fulfilling its fundamental task of splitting the costs of a sewer interceptor and assessing those costs to specially benefitting properties is found in Cloverdale Foods Co. v. City of Mandan, 364 N.W.2d 56, 58-59 (N.D. 1985). In City of Mandan, the City of Mandan specially assessed the costs of constructing a sewer interceptor and enlarging an existing waste water lagoon. The construction of the sewer interceptor was necessary because sewer lines in the area were experiencing problems associated with

insufficient capacity. The interceptor sewer served only a portion of the city, but the waste water lagoon treated waste water from the entire city.

Mandan received an EPA grant which covered 75% of the construction costs, leaving Mandan with 25% of the costs to fund. Mandan levied special assessments to fund the remaining $587,000 for the waste water lagoon and $295,000 for the interceptor sewer. The costs of the waste water lagoon were assessed over the entire City, and the costs of the interceptor sewer were assessed only to those properties which would be or could be served by the interceptor. In assessing and apportioning the benefits, the City determined a direct relationship between capacity required in the interceptor sewer and waste water lagoon, and the water consumption of the individual user.

The Supreme Court of North Dakota approved of the following special assessment scheme:

"(a) A single family residence according to the City's records used an average of 800 cubic feet of water per month which was deemed to constitute one unit;

(b) Each multiple residence contains as many units as the separate dwelling units therein;

(c) Each mobile home park space was considered as a single unit;

(d) All tracts of land containing an industry, business or warehouse facility were assessed the number of units based on their average water usage and if less than 800 cubic feet per month was used it was considered as one unit, and if an excess of 800 cubic feet per month, it was

considered a multiple unit based on the 800 cubic foot figure;

(e) Vacant lots were assessed by the number of estimated units based on the commission's exercise of a business judgment in the light of the zoning regulations and the area the lot was located and in the case of parking lots used in conjunction with an existing commercial or industrial facility the parking lots were not assessed but considered as committed to the main facility; and

(f) In the case of all other properties including unplatted areas, areas where immediate use could not be ascertained, and lots not otherwise assessed, including unassessed parking lots, the City provided for the imposition of hook-up fees when and if the property was connected to

the water and sewer system. Such fees were deposited into a Water and Sewer Utility Fund to be used for any purposes for which such funds can be lawfully used, including the maintenance of the sewer system."

City of Mandan, 364 N.W.2d at 58-59, (emphasis added). Mandan determined the total number of units among which to divide the costs of constructing the interceptor sewer, and separately determined the total units subject to the city wide assessment to cover the costs of the waste water lagoon. Then,

"[t]he Special Assessment Commission, after having determined the benefits, prepared a complete assessment list as setting forth each lot and parcel of land assessed, the amount each lot or tract was

benefitted by the improvements, and the amount to be assessed against each lot or tract as based upon the number of units."

Id. 364.N.W.2d at 59.

Similarly, in American Oil Company v. City of St. Cloud, 295 Minn. 428, 206 N.W.2d 31 (1973), the Supreme Court of Minnesota upheld special assessments levied for the construction of a sanitary sewer trunk against properties immediately served by the sewer and properties consisting of about 500 acres not then served by the sanitary sewer trunk. St. Cloud determined that properties immediately using the sewer trunk were directly benefited, while properties not then using the sewer trunk, the future users, were indirectly benefited. St. Cloud calculated the total amounts in dollars and cents to be assessed to the

immediate users and future users. Of the total cost of $138,319.20, the City assessed a total of $40,908.90 to present users, and assessed the remaining $97,410.30 against the future users.

> "The assessment for property immediately benefitted was based on the cost of a 12-inch trunkline; the assessment for the property indirectly benefitted was based on the additional cost of putting in the 12-inch trunkline that would be sufficient to serve the area assessed for indirect benefits when the service became necessary."

Id. 206 N.W.2d at 33-34. To determine the assessment for each future user, St. Cloud then divided the cost assessed to future users on the basis of one unit per acre,

and calculated an assessment of $195 per acre. Although the City engineer determined that the benefits received exceeded the $195.00 cost per acre, the City recognized that "we were limited to assessing $195.00 per acre by the rule that the city cannot make a profit on the project." Id., 206 N.W.2d at 34.

Germantown's task was similar to those of the cities of Mandan and St. Cloud. Germantown had to determine the cost of reserve capacity (which is the work assessed) and the number of units subject to the special assessment; then Germantown had to divide the cost of reserve capacity by the number of units to determine a fixed amount to be assessed against each lot or tract based upon the number of units. Germantown had the ability to determine a proposed assessment for affected properties by using the City

of Mandan method of determining the total units to be assessed against undeveloped lots and tracts. Germantown could have reasonably estimated the number of REC's per parcel and thus determined a proposed assessment by using its business judgment and the then available zoning maps and regulations. However, Germantown never attempted to determine the number of potential REC's for any one particular zoned parcel of property, even though it had the ability to do so.

Before the decision by the Wisconsin Court of Appeals, Wisconsin case law had consistently reinforced safeguards in Wisconsin's special assessment law, Section 66.60, Wis.Stats., which prevented a special assessment from being surreptitiously used to raise general revenues. In Thomas v. City of Waukesha, 19 Wis.2d 243, 120 N.W.2d 58, 62-63

(1963), the Supreme Court of Wisconsin a police powers special assessment invalid because the municipality failed to comply with the first criteria in Section 66.60(3)(d), Wis.Stats., which required a statement that the properties affected by the assessments were specially benefitted. In re Installation of Storm Sewers, etc., 79 Wis.2d 279, 286, 255 N.W.2d 521, 524 (1977) reaffirmed that the requirement of a statement of benefits is essential to a police powers special assessment and must be made in order for the assessment to be valid.

The Wisconsin Court of Appeals decision effectively eliminates the vital safeguards of §§66.60(3)(d) and 66.60(11) Wis. Stats. and clears the way for special assessments to be used to raise general revenues.

Section 66.60(3)(d), Wis.Stats. explicitly requires in police power special assessment cases that the municipality must create a schedule of proposed assessments for each parcel affected by the special assessments:

> "A statement that the property against which the assessments are proposed is benefitted, where the work or improvement constitutes an exercise of the police power. In such case the estimates required under par. (c) shall be replaced by a schedule of the proposed assessments."

§66.60(3)(d), Stats. (emphasis added). By allowing Germantown to substitute the word "unknown" for a number stating an assessment in dollars and cents, the Wisconsin Court of Appeals allowed

Germantown to avoid having to state the total amount of the assessments levied. If information necesssary to determine the total amount levied need not be disclosed at the time of the assessment levy, then there is no possible way of forcing a reduction of a special assessment levied in excess of the cost of the work as required by §66.60(11) Wis. Stats.

Wisconsin courts had long held that municipalities may not levy special assessments which exceed the cost of the work assessed. Hardy v. Waukesha, 146 Wis. 277, 278-79, 131 N.W. 352 (1911); Bekkedal v. Viroqua, 183 Wis. 176, 197, 197 N.W. 707 (1924) ("It is elementary that the amount of the assessment to be collected cannot exceed the cost of the improvement"); Atkins v. City of Glendale, 67 Wis. 2d 43, 226 N.W.2d 190, 195 (1975) (holding that property owners were

entitled to reimbursement for excess of special assessments over actual costs). The rule in Hardy and Bekkedal is codified in Section 66.60(11), which provides:

> "If the cost of the project shall be less than the special assessment levied, the governing body, without notice or hearing, shall reduce each special assessment proportionately and where any assessments or installments thereof have been paid in excess over cost shall be applied to reduce succeeding unpaid installments, where the property owner has elected to pay in installments, or refunded to the property owner."

The Appeals Court decision failed to even consider the import of these decisions and their application to Section

66.60. The rational behind and Bekkedal and Hardy is quite simple. The law does not allow municipalities to raise general revenue or make a profit by levying special assessments. Hardy, 146 Wis. at 278.

The purpose of a schedule of proposed assessments stating each proposed assessment as a number in dollars and cents is to notify affected property owners as to the amount that will be assessed upon their properties. Once notified of the proposed amount, the property owners could evaluate whether the assessment is arbitrary, unreasonable or excessive. Thus, the purpose of Section 66.60(3)(d) Wis. Stats. is grounded in constitutional due process principles and requires effective notice to property owners as to how the government action affects their properties.

The Wisconsin Court of Appeals Court failed to confront the complete absence of a determination of the total of the special assessments levied. The Court of Appeals instead compared the amount Germantown needed to obtain by special assessment (the costs unpaid by the Wisconsin Fund Grant) with Germantown's estimation of the portion of the unknown total assessment to be collected within 27 years after the levy. Section 66.60(11) Wis. Stats. required the Court of Appeals to compare the cost of reserve capacity with the total of all the assessments levied and collectible, whether collected or uncollected after 27 years. Such a comparison is impossible without fixed and known assessments.

The evidence shows reason to believe that the assessments levied vastly exceed the cost of the reserve capacity.

Germantown calculated the cost of the reserve capacity to be 6.5% of the total cost of the interceptor or $614,944.26. The Court of Appeals agreed, but inexplicably and without reference to part of the record, said that there was no difference between the reserve capacity cost and the entire cost.[1] The Court of

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[1] The Wisconsin Fund Grant program was established under §144.24, Wis. Stats., and is regulated under NR 128, Wis.Adm. Code. The Wisconsin Fund Grant program allows municipalities to apply for state funds to help pay for point source sewer systems, including sewer interceptors. Section 144.24(4)3. provides:

> "The amount of reserve capacity for treatment works eligible for grant assistance is limited to that future capacity required to serve the users of the treatment works expected to exist within the service area of the project 10 years from the time the treatment works are estimated to become operational, or in the case of interceptor sewers and associated pertinencies, the estimated date of operation. The Department, in consultation

Appeals then attempted to determine if Germantown would collect more than $4,905,000 (the unfunded part of the

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> with the Demographic Services Center and the Department of Administration under §16.96, shall promulgate rules defining procedures for projecting population used in determining the amount of reserve capacity." (emphasis added).

Section 144.24(4)3 clearly states that Wisconsin will not fund the cost of building reserve capacity in interceptor sewers. This legislative directive is made crystal clear in NR 128.06(2), which defines the eligible costs for the grant as those costs of building an interceptor with existing capacity to serve only existing users. Any portion of the total project cost to build reserve capacity to serve future users are ineligible costs and cannot be funded by the grant. See NR 128.07; 128.06(2). Section 144.24(4)3 is clear that municipalities must find sources other than the Wisconsin Fund Grant to pay for the cost of reserve capacity and the unfunded cost of existing capacity.

The Court of Appeals conclusion that the cost of the reserve capacity in the interceptor was equal to the entire cost of interceptor inexcusably ignored the clear distinction mandated by the statute.

entire cost) within 27 years after the assessments were levied. The Court of Appeals ignored the crucial difference between levying and collection. Either way, the assessment is excessive, confiscatory and unconstitutional.

During the first 27 years after the levy, Germantown expects to collect $125,000 plus interest per year. This means that 125 x 27 or 3375 REC's will have been assessed. But it is not reasonable, however, to believe that after 27 years all development in the assessment district will cease. At trial Germantown's Village Engineer admitted that up to 8,311 new REC's could be assessed upon development of the property in the assessment district. Multiplied by $1,000 the total potential of reserve capacity assessment could reach $8,311,000 or approximately $3.3 million more than

$4,905,000 Germantown needed to pay for the unfunded costs of existing capacity.

Germantown can expect to ultimately make a profit. Germantown's special assessment applies to every property which connects to the interceptor sewer after December 31, 1985 and Germantown will clearly be collecting assessments from properties connecting after the 27 year period runs. Special Assessments must be paid to Germantown until every parcel in the 2005 Sewer Service Area is fully developed because the special assessment remains a lien on all the property in the assessment area until connection to the sewer system is made, whenever that may occur. The Court of Appeals refused to consider the reasonably foreseen overassessment; it assumed that Germantown would refund and recalculate the assessments levied once the amount

collected exceeds the cost of the reserve capacity. Thus, the Court of Appeals held that an excessive levy cannot be challenged until the portion of the total levy actually collected exceeds the cost of the work. The Court of Appeals ignored §66.60(12)(e) Wis. Stats., which states that there is only one appeal from a special assessment. If this petition is denied, Germantown is home free; Petitioners are barred from challenging the overassessment later.

The Court of Appeals assumed that Germantown would, on its own and without the threat of challenge by appeal, undertake a complicated if not impossible series of recalculations and refunds to comply with Section 66.60(11) when and if the collections exceed the costs in the future. Germantown would be required to (1) recalculate the total amount of the

assessment and the assessment on each property; (2) disburse refunds for any overassessment proportionately to all who have already paid the assessment; and (3) reduce each unpaid special assessment proportionately after <u>each</u> additional assessment is collected above the cost. The tasks are mathematically mind boggling. The Court of Appeals did not suggest how an assessment in an "unknown" amount can be recalculated or proportionately reduced. It is unlikely that more than two decades into the future, Germantown will begin the series of recalculations and refunds. What will happen is that Germantown will continue to collect assessments over and above the cost of the work, or it will stop collecting thereby releasing the assessment liens on those properties which have not paid by that date thereby

violating the equal protection rights of all who have paid over the years. Petitioners' properties were specially benefitted by the construction of reserve capacity in the interceptor, but that does not justify special assessments unreasonably exceeding the cost of the reserve capacity.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that the United States Supreme Court grant their petition for a writ of certiorari to the Wisconsin Court of Appeals.

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Petitioners,

v.

VILLAGE OF GERMANTOWN, WISCONSIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WISCONSIN

APPENDIX FOR WRIT OF CERTIORARI

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STATE OF WISCONSIN IN COURT OF APPEALS

DISTRICT II

CIT GROUP/EQUIPMENT
FINANCING, INC.,

Plaintiff-Appellant, *

v.

THE VILLAGE OF GERMANTOWN,

Defendant-Respondent.

VIOLET JOAN EHRLICH,

Plaintiff-Appellant,

v.

THE VILLAGE OF GERMANTOWN,

Defendant-Respondent.

ARMBRUSTER BUILDERS, INC.,

Plaintiff-Appellant,

v.

VILLAGE OF GERMANTOWN

Defendant-Respondent.

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* - Petition to review denied.

NELSON G. EVENSON

and ELFRIEDA EVENSON,

Plaintiffs-Appellants,

v.

THE VILLAGE OF GERMANTOWN,

Defendant-Respondent.

GARY J. DIVALL

and JONATHAN S. ROSS,

d/b/a ASHBURY MEADOWS ASSOCIATES,

Plaintiffs-Appellants,

v.

THE VILLAGE OF GERMANTOWN,

Defendant-Respondent.

JAMES A. BRUNDAHL

and BERNADETTE BRUNDAHL,

Plaintiffs-Appellants,

v.

VILLAGE OF GERMANTOWN,

Defendant-Respondent.

COURT OF APPEALS

Nos. 90-1934, 90-2570. Submitted on briefs April 19, 1991 - Decided May 22, 1991.

(Also reported in 471 N.W.2d 610)

APPEAL from a judgment and an order of the circuit court for Washington county: J. TOM MERRIAM and LAWRENCE F. WADDICK, Judges. *Affirmed.*

On behalf of the plaintiffs-appellants, the cause was submitted on the briefs of David R. Olson, Gary A. Ahrens and Peter R. Reckmeyer of Michael, Best & Friedrich of Milwaukee.

On behalf of the defendant-respondent, the cause was submitted on the brief of Daniel L. Sargeant and Jerry A. Edgar of Schloemer, Alderson, Seefeldt & Spella, S.C., of West Bend.

Before Brown, Scott and Anderson, JJ.

BROWN, J. The appellants challenge the Village of Germantown's special assessment for future users of the reserve capacity of a new sewer interceptor linking Germantown to the Milwaukee Metropolitan Sewerage District (MMSD). The issues are whether the assessment was made upon a reasonable basis, whether it stated the benefits for each assessed property pursuant to sec. 66.60(3)(d), Stats., and whether the assessment proceeds would not exceed the total cost of the project as required by sec. 66.60(11).

We affirm because we conclude that the assessment was reasonable; Germantown fulfilled the statutory requirement to state the benefits to the property owners affected by the assessment; Germantown made a reasonable projection that the total amount to be collected by the

assessment will not exceed the cost of the interceptor; and any funds collected beyond the total reserve capacity cost can be reimbursed to the property owners in the future.

In 1981, a regional sewerage plan adopted by the Southeastern Wisconsin Regional Planning Commission, the Wisconsin Department of Natural Resources, and the United States Environmental Protection Agency required Germantown to abandon its existing wastewater treatment plant and build a sewer interceptor connecting Germantown to the MMSD. Germantown lost a lawsuit challenging this requirement. Subsequently, Germantown was under a moratorium barring any new sewer connections until it complied with the plan.

The projected cost of the total project was $22 million. Increased sewer

service charges covered $12 million of the debt. The following funding plan was adopted for the remainder:

1.	Wisconsin Fund Grant	$5,413,550
2.	Special Assessment of Property Adjacent to Interceptor	$275,193
3.	Reserve Capacity Assessment	$4,905,641

It is the reserve capacity assessment that is at issue in this appeal. However, the Wisconsin Fund Grant is relevant to the assessment.

The Wisconsin Fund Grant program was established under sec. 144.24, Stats., and is regulated by Wis. Adm. Code sec. NR 128. Eligible costs for the grant are the costs necessary for an interceptor having a capacity to serve only existing users. *See* Wis. Adm. Code sec. NR 128.06(2). Any portion of the cost for a reserve capacity

to serve future users cannot be covered with a grant from the fund. *See* Wis. Adm. Code sec. NR 128.07.

To determine the fundable costs, Germantown was required to determine the parallel cost ratio, which is the cost of the interceptor without a reserve capacity divided by the cost of the interceptor with a reserve capacity. *See id.* Germantown determined that the parallel cost ratio was 93.5%. This meant that 93.5 % of the interceptor's cost was to serve existing users and was therefore eligible for the Wisconsin Fund's 60% funding grant.

After the grant, Germantown still needed to fund the 40% of the eligible cost not funded by the grant, the ineligible 6.5% of the cost attributed to the reserve capacity alone, and miscellaneous costs including interest.

After levying a special assessment for properties adjacent to the interceptor and applying a small contingency fund to the project, Germantown passed a resolution invoking its police powers and levying the reserve capacity assessment on undeveloped property that was not connected to Germantown's sewer system by December 31, 1985.

The reserve capacity assessment plan called for postponing the collection of the assessment until the property was developed. Only when a property was actually connected to the Germantown sewer system would an exact assessment be made by calculating the number of residential equivalency connections (REC) for the property. The REC calculation would adjust commercial and industrial development to an equivalent residential

use based on the average water consumption of a single family home.

The assessment plan called for charging each REC $1000, subject to certain deductions, plus interest of 7% per year. To arrive at this amount for each future REC's assessment, Germantown projected a moderate growth rate of 125 RECs per year for twenty-seven years, even though the interceptor was designed to deal with an even greater growth ratio the assumption of the moderate rate was based on with an even greater growth rate. The assumption of the moderate rate was based on recent growth trends and reduced population projections for southeastern Wisconsin.

The appellants are property owners affected by the reserve capacity assessment. They argue that the assessment is unreasonable, arbitrary and

inequitable because it is designed to collect almost $5 million, although Germantown's parallel cost ratio in the Wisconsin Fund Grant application attributed only $614,994.26 to the reserve capacity cost of the interceptor. The appellants also argue that Germantown underestimated the annual growth rate for RECs and thus Germantown actually will collect over $8 million from the assessment rather than only $5 million.

Additionally, the appellants argue that the assessment violates the procedural requirements of sec. 66.60 (3)(d) and (11), Stats., because Germantown did not assign a known amount to be collected from each parcel of property and thus could not show that the property would be benefitted or that the assessment would not exceed the total cost of the interceptor's reserve capacity. In

connection with their other arguments, the appellants also contend that the assessment constitutes a taking of property and a denial of equal protection in violation of the Wisconsin Constitution and the United States Constitution.

Section 66.60(1), Stats., authorizes a municipality to exercise its police power to make special assessments upon a reasonable basis. The police power of a municipality is broad and, in general, the courts may intercede only when the exercise of that power is clearly unreasonable. *Peterson v. City of New Berlin*, 154 Wis.2d 365, 370, 453 N.W.2d 177, 180 (Ct. App. 1990). Whether an assessment fulfills the legal standard of reasonableness is a question of law which we review *de novo*. *Id.*

We first address the issue whether it was reasonable for Germantown to use the

reserve capacity assessment to collect almost $5 million from future users even though Germantown indicated in its application for the Wisconsin Fund Grant that the cost attributed to the reserve capacity was only $614,944.26. To understand the difference between the engineering formula used for the grant and the funding formula used for the assessment, it is helpful to picture the cost for future users and the cost for existing users as two concentric circles. The total cost of the interceptor with a reserve capacity for future users is a large circle, while the cost for the interceptor with a capacity to serve only existing users is a smaller circle covering 93.5% of the area inside the large circle.

The reserve capacity costs that were ineligible for the grant is the narrow

area between the circumference of the two circles. This area represents the 6.5% difference in cost between the sewer project with an oversized pipe that could accommodate future property development and a regular-sized pipe that would serve only existing users. The grant would not pay for the oversized portion of the pipe that was clearly for future users. However, the 93.5% costs represented by the smaller circle served future users as well as existing users. Yet, the fund's parallel cost ratio formula did not require Germantown to allocate costs in the smaller circle between existing users and future users for funding purposes. That clearly would be impossible since the costs in the smaller circle are constant whether or not there is a reserve capacity built into the system for future users.

It is clear that the narrow area between the two circles does not represent the whole cost of the reserve capacity. Rather the total reserve capacity cost is represented by the entire area inside the large circle, including all of the area bounded by the smaller circle. Thus, the 40% of the small circle's costs that remained after the 60% grant were costs attributable to future users as well as to existing users. In fact, the future users also benefitted from the grant's 60% funding of the costs of the existing users, since the future users shared in those costs and would have had to pay for them if the grant had not funded them.

When Germantown levied its reserve capacity assessment, it was not concerned with allocating costs according to an engineering formula but according to a formula that fairly and equitably

distributed costs in relation to benefits. To require existing users to pay for 100% of the costs within the smaller circle and assess future users only for the costs in the narrow area between the two circles would be grossly disproportionate and inequitable. We conclude that it was reasonable for Germantown to assign to future users the 40% unfunded costs in the smaller circle along with the miscellaneous costs and the 6.5% costs clearly attributable to the reserve capacity. It was also equitable for Germantown to decide that existing users already paid their fair share of the costs through the 60% funding grant, through increased sewer charges, and through the sewer service charges and reserve capacity fee payments they made for the previous wastewater treatment facility and collector system. The previous system

remained in use after the interceptor's connection to MMSD, except for the treatment plant itself.

The appellants argue that Germantown did not meet the procedural requirements of sec. 66.60(3)(d), Stats. When a municipality proceeds under its police power to levy a special assessment, sec. 66.60(3)(d) requires a "statement that the property against which the assessments are proposed is benefitted." We conclude that Germantown met this statutory requirement because the director of public works explicitly included a statement of benefits in his "Special Assessment Report" dated January 21, 1988. This was sufficient because all that is required is that the property assessed is benefitted to some extent. *See Village of Egg Harbor v. Mariner Group, Inc.* 156 Wis.2d 568, 572, 457 N.W.2d 519, 521 (Ct. App. 1990).

The village need not show that the value of the benefits is equal to the assessment. *Id.*

Additionally, here it is obvious that the future users were benefitted by the assessment because they could not be connected to sewer service without the interceptor. There was a moratorium on new sewer connections in Germantown until Germantown complied with the DNR order to build an interceptor to connect to the MMSD. Future users, not existing users, were the ones hurt by that moratorium.

There is also a requirement in sec. 66.60(3)(d), Stats., that a municipality make a list of the proposed assessments. The appellants claim that Germantown did not fulfill this requirement because Germantown listed the proposed assessment as "unknown" for almost all the properties affected by the reserve capacity

assessment. The appellants claim that the statute requires a *known* proposed assessment for each property affected. We disagree.

The method of assessment may involve a variety of different alternatives. *Village of Egg Harbor*, 156 Wis.2d at 572, 457 N.W.2d at 521. The only requirement is that the method of assessment be reasonable under the existing circumstances. *Id.* Reasonableness requires that the assessment be made to fairly apportion the cost and may not arbitrarily or capriciously burden any group of property owners. *Id.* at 573, 457 N.W.2d at 521-22. We conclude that Germantown's proposed REC calculations will fairly apportion the cost of the interceptor's reserve capacity. Each REC calculation will use average residential

consumption as the common standard of measurement. Moreover, the RECs will not be calculated and payments on the assessments will not be due until a property is actually developed.

The appellants argue that the assessment violates sec. 66.60(11), Stats., because Germantown will collect more than $8 million through the reserve capacity assessment, while the cost to be funded by the assessment is under $5 million. This is another variation on the appellants' general theme of disagreement with the REC method of calculating individual assessments. The appellants project the maximum number of RECs possible, whereas Germantown based its projections on a moderate growth rate for the area. We conclude that Germantown's moderate projections were reasonable. Moreover, if Germantown's projections

prove too conservative and the amount collected by the assessment exceeds the cost of the interceptor's reserve capacity, Germantown can reduce the assessment and reimburse property owners who have already paid more than the amended assessment.

Because the assessments were reasonable and fulfill the statutory requirements for an assessment where a municipality proceeds under its police power, there was no taking of property in violation of the Wisconsin Constitution or the United States Constitution. Neither was there a violation of the constitutional equal protection clauses since all future users were similarly treated by the assessment and the assessment had a rational basis.

The appellants argue that this case should be remanded for a new trial because

Judge Merriam simply adopted Germantown's brief as the court's findings of fact and conclusions of law since the case concluded shortly before his retirement and he did not have time to issue a more lengthy opinion. His judgment was affirmed by an order of Judge Waddick denying the appellants' post trial motions seeking a new trial and amended or additional findings of fact and conclusions of law. We conclude that Judge Merriam's adoption of Germantown's trial brief met the requirements of sec. 805.17(2), Stats., for actions tried to the court without a jury.

By the Court.--Judgment and order affirmed.

Office of the Clerk

SUPREME COURT

231 E. STATE CAPITOL

P.O. BOX 1688

MADISON, WISCONSIN 53701-1688

TELEPHONE 608-266-1880

October 8, 1991

TO:

Hon. J. Tom Merriam

Reserve Judge

752 Highland Views Dr.

West Bend, WI 53095

David R. Olson

Gary A. Ahrens

Peter R. Reckmeyer

Michael, Best & Friedrich

100 E. Wisconsin Avenue

Milwaukee, WI 53202

Daniel L. Sargeant
Jerry A. Edgar
Schloemer, Alderson,
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101 S. Sixth Avenue
West Bend, WI 53095

You are hereby notified that the Court has entered the following order:

No. 90-1934 and 90-2570 CIT Group/Equipment Financing, Inc. v. The Village of Germantown, et al. L.C.#s 88CV338, 88CV530, 88CV531, 88CV532, 88CV533 & 88CV534

A petition for review pursuant to sec. 808.10, Stats., having been filed on behalf of plaintiffs-appellants-petitioners CIT Group/Equipment Financing, Inc., Violet Joan Ehrlich, Armbruster Builders, Inc., Nelson G. Evenson and

Elfrieda Evenson, Gary J. Divall and Jonathan S. Ross, d/b/a Ashbury Meadows Associates, and James A. Brundahl and Bernadette Brundahl, and considered by the court,

IT IS ORDERED that the petition for review is denied, with $50 costs.

Marilyn L. Graves

Clerk of Supreme Court

STATE OF WISCONSIN

CIRCUIT COURT

WASHINGTON COUNTY

CIT GROUP/EQUIPMENT FINANCING, INC., et al.,

Appellants,

-vs-

VILLAGE OF GERMANTOWN,

Respondent.

Case No. 88-CV-338 and consolidated cases:

88-CV-530
88-CV-531
88-CV-532
88-CV-533
88-CV-534

ORDER FOR JUDGMENT

Upon these actions having come on for decision on June 27, 1990, and for clarification of the decision on July 11, 1990, and the parties having appeared by

their respective attorneys by telephone conference, Michael, Best & Friedrich, by Gary A. Ahrens, for the appellants, and Schloemer, Alderson, Seefeldt, Spella Shanebrook, S.C., by Daniel L. Sergeant, for the respondent, and the court having reviewed and considered the briefs of the parties and arguments of counsel, and the court having found that the respondent balanced the costs of its interceptor sewer project in a reasonable manner and that the appellants failed to rebut the presumption that the respondent correctly levied the special assessments which are the subject of these actions, and the court having adopted the statement of facts set forth on pages 2 through 6 of the respondent's post-trial brief dated April 17, 1990 as the court's findings; and

Based on the foregoing findings, the court concludes that the respondent's reserve capacity special assessments levied on March 21, 1988 are reasonable and meet the requirements of sec. 66.60, Stats.; now, therefore,

IT IS ORDERED that judgment in favor of the respondent affirming the special assessments levied by final resolution Nos. 11-88 dated March 21, 1988, for the interceptor sewer project shall be entered, and further that the appellants' appeals shall be dismissed with costs to the respondent.

Dated this 17 day of July, 1990.

BY THE COURT:

/s/ J. Tom Merriam,

Circuit Judge

STATE OF WISCONSIN

CIRCUIT COURT

WASHINGTON COUNTY

CIT GROUP/EQUIPMENT
FINANCING, INC., et al., Case No. 88-CV-338

VIOLET JOAN EHRLICH, Case No. 88-CV-530

ARMBRUSTER BUILDERS, INC. Case No. 88-CV-531

NELSON G. EVENSON and and ELFRIEDA EVENSON Case No. 88-CV-532

GARY. J. DIVALL and JONATHAN S. ROSS d/b/a ASHBURY MEADOWS ASSOCIATES, Case No. 88-CV-533

JAMES A. BRUNDAHL and Case No. 88-CV-534

Appellants.

vs.

VILLAGE OF GERMANTOWN,

Respondent.

Stenographic Transcript of Court Decision in the above-entitled civil actions in said Court, the Honorable J. Tom Merriam, Circuit Judge, presiding, at West Bend, Wisconsin, on Wednesday, June 27, 1990, commencing at 2:25 o'clock in the afternoon.

A P P E A R A N C E S

MR. GARY A. AHRENS, Attorney-at-Law, 250 E. Wisconsin Ave., Milwaukee, WI 53220-6360, of MICHAEL, BEST & FRIEDRICH, appeared on behalf of the Appellants.

MR. DANIEL L. SARGEANT, Attorney-at-Law, 101 South Sixth Avenue, P.O. Box 176, West Bend, WI 53095, og SCHLOEMER, ALDERSON, SEEFELDT, SPELLA & SHANEBROOK, S.C., appeared on behalf of the Respondent.

P R O C E E D I N G S

(Whereupon, said proceedings in the above-entitled civil action were commenced in open court via teleconference speaker phone as follows:)

THE COURT: At this time then I will go ahead and call CIT Group Equipment Financing, Incorporated, and others, vs. the Village of Germantown.

I think the record may reflect that this matter is set up in the Branch I courtroom, and counsel are both making their appearances via teleconference phone at my request in order to dispose of a Decision.

Would you put your appearances on record now?

MR. AHRENS: For CIT, Michael, Best & Friedrich, by Gary Ahrens.

MR. SARGEANT: And the Village of Germantown appears by Daniel Sargeant.

THE COURT: Now I had indicated to you gentlemen off the record here that I was setting this up to give you my Decision in this case. I have spent an awful lot of time reading and rereading briefs. I appreciate that both of you came back to court at one time to argue this further.

The Decision I am going to be giving you here is verbal. It's a very short Decision. I will try and set it up though, so there is a proper appellate record. I, frankly, just do not have the time to sit down and write a learned Decision in this case because of the length of time that would be required.

Basically here, the question that was raised before the Court is the assessment of the reserve capacity in the Village after construction of the new sewer system pipeline, I guess is what you would call it. Basically, I would note that the

Petitioners emphasize that the DNR subsidy for the cost of the existing users was set at 60 percent, and that this is being emphasized, but there are alot of other points.

But basically I can't find that the subsidy procedure used by the Village in placing 60 percent on existing users actually controls their procedure in making the actual assessment here. I think I would have to find that the Village balanced the cost between the old and new users in a reasonable manner here.

Basically, I would have to observe that the burden is upon the Petitioners to rebut the basic presumption here that the reserve capacity assessment was incorrect; and I would have to find that they have not rebutted that presumption; so I would have to reject the Petitioner's Petition here.

But for appellate purposes I think it's important that I do this; that I would basically adopt and use the Village's Brief as the basic Findings of the Court so you have a proper appellate background here. So, in other words, I'm adopting the Respondent Village's Brief as the Decision in this case. That's the one that they filed here on April 17, 1990.

Now I'm not going to attempt to answer any questions; but basically you do understand the Decision?

MR. SARGEANT: I do, Judge.

I assume you want me to do the Order affirming the Assessment?

THE COURT: Yes, I think you would have to do that.

MR. SARGEANT: Okay.

THE COURT: And I would frankly say this whole thing has given me an awful lot of concern. I don't like making the

Decision this way; but that's what my-- With my retirement coming up and the work I have to get done out of here, and the current calendar, I just don't have the time to, as I stated before, write a learned and lengthy Decision which, frankly, I think this case should have.

Anything further then, gentlemen?

MR. AHRENS: Not at this time, Your Honor.

MR. SARGEANT: Not from me, Judge.

THE COURT: Okay.

Thank you. That's it then.

MR. SARGEANT: Thank you.

THE COURT: Goodbye.

(whereupon, said proceedings were concluded.)

CERTIFICATE

I, Loretta Justman, Official Court Reporter in and for Branch I of the Circuit Court of Washington County, Wisconsin, hereby certify that as such reporter I attended the proceedings held in the above-entitled civil action on Wednesday, June 27, 1990, at West Bend, Wisconsin, before the Honorable J. TOM MERRIAM, Circuit Judge, commencing at 2:25 o'clock p.m., and reported by machine shorthand the proceedings held at said time and place.

I further certify that the foregoing typewritten transcript has been carefully compared by me with my original stenographic notes thereof, so taken at said time and place; and that the foregoing is a full, true and complete transcript of said proceedings held at

said time and place, and is the official transcript thereof.

/s/ Loretta Justman
Loretta Justman

Official Court Reporter

STATE OF WISCONSIN

CIRCUIT COURT

WASHINGTON COUNTY

CIT GROUP/EQUIPMENT
FINANCING, INC., et al.,

Appellants,

-vs-

VILLAGE OF GERMANTOWN,

Respondent.

Case No. 88-CV-338
and consolidated
cases:
88-CV-530
88-CV-531
88-CV-532
88-CV-533
88-CV-534

RESPONDENT'S POST-TRIAL BRIEF

SCHLOEMER, ALDERSON, SEEFELDT,
SPELLA & SHANEBROOK, S.C.
Attorneys for Respondent

By Daniel L. Sergeant

Jerry A. Edgar

FACTS

The special assessments at issue were levied by Germantown to finance a portion of the costs of constructing an interceptor sewer connecting its sewer system to the MMSD's sewer system. The assessments were specifically earmarked for the "reserve capacity" of the interceptor sewer, i.e. that portion of the pipe designed to handle wastewater flows of future connections or users. (Ex. 2.)

Some background is helpful to understand the necessity for the interceptor. Germantown constructed its first wastewater treatment facility in 1956 and built a second one in 1969. In the 1970's, the Southeastern Wisconsin

Regional Planning Commission (SEWRPC) prepared an area-wide water quality management plan (208 Plan) which recommended regional sanitary sewer service for the Milwaukee metropolitan area, including Germantown. The MMSD, in its master facility plan approved by the Wisconsin Department of Natural Resources (DNR) in 1981, recommended construction of a series of forcemains, lift stations, and gravity sewers in Germantown to convey wastewater to an existing sewer at the Germantown-Milwaukee County boundary. (See ex. 5, ch. 2.) Ultimately, Germantown constructed a system within its boundaries to convey its wastewater to the MMSD, and such construction is the "interceptor" for which the special assessments at issue were levied. The actual connection of the two sewer systems occurred in January of 1988.

Before constructing the interceptor, however, Germantown, through a series of legal actions beginning in 1981, sought a revision of the 208 Plan to permit Germantown to construct a new local wastewater treatment facility. (E.g., see exhibits 16 and 17.) Germantown contended that a new local facility would be more cost effective than connecting to the MMSD system. Germantown's attempt to overturn the DNR's order to connect to the MMSD system eventually failed and the interceptor was constructed. Perhaps the final nail in the coffin which caused Germantown to comply with the connection order was a sewer extension moratorium imposed on it by the DNR. The moratorium prevented any development requiring new sewer main extensions. The DNR did not lift the moratorium until Germantown entered into a service contract with the

MMSD. (Mielke, Tr. T. pages 146-48.) To facilitate future development, Germantown had to build the interceptor.

To connect to the MMSD, Germantown was faced with a highly expensive project, with costs of approximately $11,000,000 to construct the interceptor, including interest, and approximately $11,000,000 more for anticipated capital contributions to the MMSD, for a total of approximately $22,000,000. (See ex. 2, schedule E.) This was the overall big picture facing Germantown. The entire MMSD connection project included the interceptor project.

In 1985, Germantown's board of trustees determined that a portion of the MMSD connection costs should be paid by sewer service charges, and the board substantially increased such charges by ordinance. As a result, beginning in 1986, the average annual residential sewer

charge was $398, $236 of which was and is earmarked towards the debt incurred by the MMSD connection. (Ex. 2, schedule D.) Germantown estimated that the sewer service charges will retire approximately $12,000,000 of the total debt. (Ex. 2, schedule E.)

To finance construction of the interceptor, Germantown used a combination of methods. First, it obtained Wisconsin Fund grants from the DNR of $5,413,550. (Ex. 11, and see ex. 2., schedule B.) The remaining portion of the interceptor cost, $5,240,417, had to be financed by Germantown. Two special assessments were levied. The first, referred to as an 8" equivalency special assessment, was levied against properties directly adjacent to the interceptor. (Ex. 2., schedule D.) The 8" equivalency special assessment is not at issue in this action.

The other special assessment, the reserve capacity assessment, is the subject of this action. This special assessment was levied on all properties in the Germantown sewer service area which were not connected to the sewer system by December 31, 1985. (Ex. 4.) The reserve capacity assessments are based on residential equivalents at the amount of $1,000 per residential equivalent. Germantown estimated that an average of 125 residential equivalent connections (RECs) would be made each year to its sewer system. Certain credits for the debt portion of sewer charges were given to those properties which connected after December 31, 1985 but before the assessments were actually levied. (See ex. 2, schedule D.)

The rationale for the manner in which the assessments were levied is set forth

in the report of the Germantown director of public works (Ex. 2) and was testified to at trial by Germantown's witnesses. Essentially, the reserve capacity assessments are based on the idea that the assessed properties are specially benefitted by the interceptor. Without it, sewer service would not have been available to unconnected properties.

An additional consideration was that eligibility for the Wisconsin Fund grants was directly attributable to the "existing users," i.e. those users connected to the system by December 31, 1985. (See NR sec. 128.06(2), Wis. Admin. Code.) Additional credit was given to the existing users for their financial contributions to the local wastewater collection and treatment system, all of which remained in use after connection to the MMSD, except for the

local treatment plant. (Ex. 2, schedule D.)

The reserve capacity special assessment was levied on lands within the Germantown sewer service area which were not connected to its sewer system on December 31, 1985. (Ex. 2, schedule D.) These lands were vacant (i.e. unimproved) at that time. Much of these lands were (and continue to be) zoned agricultural. (Turner, Tr. T. p. 243.)

The amount assessed against a particular parcel ia based on the number of residential equivalent connections (REC's) for that parcel.

The number of RECs for each parcel will be determined when the parcel is developed. (Ex. 2, schedule D.) Payment of the assessments is deferred until the properties are developed and connected to the sewer system. (Ex. 4.)

Lands which connected after January 1, 1986 but before the assessments were levied in March of 1988 were specially assessed, but received credits attributable to (1) the debt retirement portion of their sewer service charges, and (2) payment of their reserve capacity fee of $225, if paid before March 31, 1988. (Ex. 4, sec. 2(a) and (b).)

Schedule B of the director of public works' report (Ex. 2) sets forth the statement of estimated costs for the interceptor sewer project itself. Schedule D of the report sets forth the reasons for the financing method used, and contains a "Residential Equivalent Table" to be used in determining the number of REC's for commercial and industrial uses. The number of REC's for a residential use will be based on the average water use of

a single family home. (Ex. 2., schedule D.)

Schedule E of the report provides the financing estimate of the Costs for the entire MMSD sewer connection project, of which the interceptor project is a part. That schedule also provides a breakdown of the debt retirement for the entire MMSD connection, i.e. the "big picture." Finally, schedule G of the report is a schedule of proposed assessments.

STATE OF WISCONSIN CIRCUIT COURT

WASHINGTON COUNTY

BRANCH I

CIT GROUP/EQUIPMENT FINANCING, INC. et al., Appellant,

vs.

THE VILLAGE OF GERMANTOWN, Respondent.

Case No. 88-CV-338, Case No. 88-CV-530, Case No. 88-CV-531, Case No. 88-CV-532, Case No. 88-CV-533, Case No. 88-CV-534

ORDER DENYING APPELLANTS' MOTION FOR NEW TRIAL AND MOTION TO AMEND OR MAKE ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

Upon these actions having come on for a Decision on June 27, 1990, and the Court having entered Judgment on July 17, 1990, and Appellants having filed a Motion for a

New Trial and Motion to Amend or Make Additional Findings of Fact on July 27, 1990, and the parties have appeared by their respective attorneys before the Court on September 7, 1990, Michael, Best & Friedrich by Gary A. Ahrens, for the Appellants, and Schloemer, Alderson, Seefeldt, Spella & Shanebrook, S.C., by Daniel L. Sargeant, for the Respondent, and the Court having reviewed and considered the brief and memorandum of Appellants and arguments of counsel; and

Based on the foregoing and the record, the Court concludes that the trial court, Judge Merriam presiding, made sufficient findings of fact and conclusions of law to support the Judgment entered by the Court; now therefore,

IT IS ORDERED that Appellants' Motion for New Trial and Motion to Amend or Make

Additional Findings of Fact shall be denied.

Dated this 30 day of October, 1990.

BY THE COURT: /s/ Lawrence F. Waddick,
Circuit Court Judge

Village of Germantown

Resolution No. 11-88

FINAL RESOLUTION LEVYING SPECIAL ASSESSMENTS UNDER SECTIONS 66.60 AND 66.62 OF THE WISCONSIN STATUTES AND SECTION 8.04 OF THE MUNICIPAL CODE FOR CERTAIN PROPERTIES LOCATED WITHIN THE 2005 SEWER SERVICE AREA OF THE VILLAGE OF GERMANTOWN.

WHEREAS, the Village Board heretofore determined by preliminary resolution, adopted September 21, 1987, pursuant to secs. 66.60 and 66.62, Stats., sec. 8.04 of the Municipal Code and the police power of the Village of Germantown, to levy and collection special assessments upon certain property located within the 2005 sewer service area of the Village of Germantown; and

WHEREAS, the Director of Public Works prepared his report of special assessments to be levied, including a schedule of

proposed assessments, and filed said report with the Village Clerk; and

WHEREAS, notice of public hearing was given by the Village Clerk as provided by law, as shown by affidavits of mailing and publication and the records on file herein; and

WHEREAS, the Village Board held a public hearing in the Washington High School Gymnasium on March 3, 1988, commencing at 7:30 P.M. and all persons desiring to be heard were heard; and

WHEREAS, the Village Board has considered the evidence and statements of the different parties appearing at said public hearing and has considered said report and the proposed assessments contained therein and has considered the reasonableness of the basis used in determining the proposed assessments and

has discussed all of said matters fully; and

WHEREAS, the Village Board is fully advised in these matters and is now ready to make the final levy of special assessments for the benefits conferred as set forth herein; now, therefore,

BE IT RESOLVED BY THE VILLAGE BOARD OF THE VILLAGE OF GERMANTOWN, WASHINGTON COUNTY, WISCONSIN, THAT:

1. After due consideration of the report of the Director of Public Works in the matter set forth in the preamble hereto, the Village Board hereby finds and determines that the properties set forth in said report, and each of them, are benefitted by the construction of the interceptor sanitary sewer system, and the Board upon such consideration determines that the proposed assessments made were determined upon a reasonable basis.

2. Upon such findings and determinations, said report, including the final project plans and specifications, the statement of final project costs, the statement of benefits, the statement of project financing methods including special assessments, and the schedule of proposed assessments, is hereby approved, except that:

(a) the statement of project financing methods including special assessments is hereby amended and modified to provide that users connected since January 1, 1986, shall receive an additional credit for the debt retirement portion of sewer service charges paid during the first quarter of 1988, computed in the same manner as provided in said statement; and

(b) the schedule of proposed assessments shall be amended and modified

to reflect the credits granted under (a) above and to reflect reserve capacity fee payments of $225.00 made through March 31, 1988.

3. The proposed assessments set forth in said report are hereby assessed and levied against said properties as special assessments for the benefits incurred upon them by the interceptor sanitary sewer systems project and the Board hereby directs that payment of said special assessments be made as hereinafter provided and orders the owners of said properties to pay such special assessments in the manner hereinafter provided.

4. The proceeds from such special assessments shall be used for paying the costs of the interceptor sanitary sewer system project.

5. The assessments are made pursuant to the police power of the Village of

Germantown and sections 66.60 and 66.62, Stats., and sec. 8.04 of the Municipal Code.

6. Each special assessment levied by this resolution shall be a lien upon the property against which it is levied on behalf of the Village of Germantown in accordance with sec. 66.604, Stats.

7. (a) Each owner of property currently served by sewer connected after December 31, 1985 has the option to pay his or her or its reserve capacity assessment in full without interest before September 1, 1988, or in three (3) equal annual installments, in accordance with sec. 66.54, Stats., with interest thereon at the rate of 9% per annum, such interests to commence as of the date this resolution is adopted and to be computed through December 31 of each year. All assessments will be collected in

installments, except such assessments which are paid in full to the Village Treasurer on or before November 1, 1988. The first installment shall be entered in the 1988 tax roll as a special tax on the property upon which the special assessment was levied, and thereafter shall be treated in all respects as any other municipal tax, except as otherwise provided in sec. 66.54, Stats. Hereafter, in each subsequent year, an installment shall in like manner and with like effect be entered in the annual tax roll until all installments have been levied. Each property owner who is paying by installment may prepay his or her or its assessments, together with accrued interest, at any time without penalty. In the event the property owner fails to pay any installment in full at the time it is due, said owner shall be deemed delinquent

in the payment thereof and his or her or its entire unpaid assessment, together with accrued interest through December 31 of the year said delinquency occurs, shall be extended upon the next succeeding tax roll as a delinquent tax against the property and all proceedings in relation to the collection, return and sale of property for delinquent real estate taxes shall apply to such special assessment, except as otherwise provided by statute.

(b) The reserve capacity assessment on all property not now connected to the sewerage system is deferred in accordance with sec. 66.605, Stats., until such time that application for sewer service is made. Upon such application, the property owner shall, for each residential equivalency or portion thereof as determined by the Village Engineer, pay the reserve capacity

assessment including increases thereof as provided for herein. Said deferred reserve capacity assessment shall be paid in full prior to the issuance of a building permit or, if the property is part of a project which is subject to a developer's agreement entered into pursuant to Chapters 17 or 18 of the Municipal Code, said deferred reserve capacity assessment shall be paid in full prior to the execution of the developer's agreement. The reserve capacity assessment of $1,000.00 shall, as of January 1, 1989 and as of each January 1 thereafter, be automatically increased by 7% of the amount of the assessment during the prior year, unless said annual increase is suspended by the Village Board.

8. All payments hereunder are to be made to the Village Treasurer.

9. The Village Clerk is hereby authorized and directed to publish a copy of this resolution as a Class 1 notice in the Germantown Banner Press and shall mail a copy of this resolution and this statement of the final assessment against his or her or its property to every interested person whose name appears on the assessment schedule and whose post office address is known, or can with reasonable diligence, be ascertained.

10. The Village Clerk is hereby authorized and directed to publish the "Installment Assessment Notice" attached hereto and made a part hereof as a Class 1 notice and to mail a copy thereof to every interested person.

11. This resolution shall become effective upon passage and publication and notice and compliance with secs. 9 and 10 above.

Introduced by Trustee Arthur H. Zabel

Adopted: March 21, 1988

Vote: Aye 8 Nay 0

/s/ Charles Crump

Village President

ATTEST:

Jane A. Unke

Village Clerk

COURT OF APPEALS OF WISCONSIN

DISTRICT 2

CIT GROUP/EQUIPMENT (88-CV-338)
FINANCING, INC.,

Plaintiff-Appellant,

v.

VILLAGE OF GERMANTOWN,

Defendant-Respondent.

VIOLET JOAN EHRLICH, (88-CV-530)

Plaintiff-Appellant, Appeal Nos.

v. 90-1934

VILLAGE OF GERMANTOWN 90-2570

Defendant-Respondent.

ARMBRUSTER BUILDERS, INC. (88-CV-531)

Plaintiff-Appellant,

v.

VILLAGE OF GERMANTOWN,

Defendant-Respondent.

NELSON G. EVENSON (88-CV-532)
and ELFRIEDA EVANSON,
Plaintiffs-Appellants,
v.
VILLAGE OF GERMANTOWN,
Defendant-Respondent

APPEAL FROM A JUDGMENT BY THE HON. J. THOMAS MERRIAM AND

GARY J. DIVALL (88-CV-533)
and JONATHAN S. ROSS,
d/b/a ASHBURY MEADOWS
ASSOCIATES,
Plaintiffs-Appellants,
v.
VILLAGE OF GERMANTOWN,
Defendant-Respondent.

FROM AN ORDER BY SUCCESSOR JUDGE LAWRENCE F. WADDICK, CIRCUIT COURT OF WISCONSIN, WASHINGTON

JAMES A. BRUNDAHL (88-CV-534)
and BERNADETTE BRUNDAHL,
Plaintiffs-Appellants,
v.
VILLAGE OF GERMANTOWN,

COUNTY

Defendant-Respondent.

APPELLANTS BRIEF

David R. Olson
Gary A. Ahrens
Peter R. Reckmeyer
Michael, Best & Friedrich
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VII. GERMANTOWN RESOLUTION NO. 11-88 CREATES AN ARBITRARY AND DISCRIMINATORY CLASSIFICATION BASED ON RESIDENT STATUS IN VIOLATION OF THE EQUAL PROTECTION CLAUSE.

Germantown Resolution No. 11-88 creates an arbitrary and discriminatory

classification of property owners who must pay the net costs of the sewer interceptor system.[2] The Resolution discriminates

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[2] Appellants' equal protection and due process claims are properly before this Court. In their pleadings and trial briefs, Appellants attacked the reserve capacity assessment as arbitrary, capricious and unreasonable. "Such an attack is the equivalent of a claim of unconstitutionality based on a denial of equal protection of the laws or due process." Petersen v. Dane County, 136 Wis.2d 501, 510, 402 N.W.2d 376, 380 (Ct. App. 1987); see also, Buhler v. Racine County, 33 Wis.2d 137, 143 (1966).

between, on the one hand, current residents of Germantown as of December 31, 1985, and, on the other hand, future residents of Germantown who will become residents sometime after December 31, 1985. As a general rule, the future residents are non-residents at the time Germantown levied the special assessments. Germantown expects an average of 125 new residential connections to be made each year for 27 years, beginning in 1988.

The invidious distinction made here is based upon district resident status versus non-resident status. Only the future residents must pay for the new interceptor sewer. The interceptor, however, was necessarily built to provide the only access to sewage treatment facilities for the benefit of the entire 2005 sewer service district. That means current residents and future residents equally

need to use and need to have access to the interceptor. Because the special assessment scheme does not apply to all users in a like manner, the requirements of equal protection are not met. See, Louisiana ex. rel Francis v. Resweber, 329 U.S. 459, 465, 67 S.Ct. 374, 377 (1947).

There is no rational basis for assessing future residents for the entire net cost of the interceptor, especially considering the substantial direct benefits received by current residents (existing users). Therefore, Germantown's classification based on resident status is arbitrary, capricious and unreasonable and violates the equal protection clause of the United States and Wisconsin Constitutions. U.S. Const. amend. XIV; Wis. Const. Art. I, Section 1.

In addition, Germantown's special assessment scheme illegally discriminates

among future users. Mr. Turner testified that once the entire cost of the interceptor is paid in full by the reserve capacity assessments, Germantown will discontinue collecting assessments from future users who connect thereafter to the interceptor: "As far as I know, when the project is paid for, it's over." (R. 25-255, lines 5-10). In other words, some future users will pay and some will not, simply on the basis of when they happen to hook up. However, there is no rational basis for distinguishing between future users of the interceptor system. Germantown's failure to affect alike all future users by extending an exemption or immunity to one part but denying them to another by arbitrary classification is contrary to the equal protection guarantees of the Wisconsin and U.S.

Constitutions. U.S. Const. amend. XIV; Wis. Const. Art. I, Section 1.

VIII. THE RESERVE CAPACITY ASSESSMENT SCHEME CONSTITUTES AN UNCONSTITUTIONAL TAKING OF PRIVATE PROPERTY WITHOUT JUST COMPENSATION IN VIOLATION OF THE 14TH AMENDMENT TO THE U.S. CONSTITUTION.

The law is clear that the exaction of more than the special benefit to the property owner constitutes a taking of private property for public use without just compensation in violation of the 14th Amendment. Norwood v. Baker, 172 U.S. 269, 279, 19 S.Ct. 187, 191 (1898); McNally v. Township of Teaneck, 379 A.2d 446, 451 (N.J. 1977); Buettner v. City of St. Cloud, 277 N.W.2d 199, 202 (Minn.

1979); U.S. Const. amend. XIV. Equally clear is that special assessments are limited by the lower of the cost of the work assessed and the enhanced value of the property. Section 66.60(11); Bekkedal, 183 Wis. at 197. Any assessment in excess of either of these two ceilings is an unconstitutional taking of property. McNally, 379 A.2d at 451; Meglino v. Township Comm. of Eagleswood, 484 A.2d 1269, 1274 (N.J. Super. 1984).

In McNally, the Supreme Court of New Jersey addressed an overassessment claim made by affected property owners who challenged constitutional taking grounds special assessments levied under the police power. The Court recognized that an unconstitutional assessment is made when the total assessment is greater than the total cost, or the individual assessment is greater than the enhanced

value. Id. 379 A.2d at 451; accord, Bekkedal, 183 Wis. at 197. As to the latter test, the Court held that the cost of the work assessed is evidence of a property's enhanced value. McNally, 379 A.2d at 450. "In the absence of any proof to the contrary the enhancement value presumably would be equated with that cost." Id. The McNally Court found that in the context of special assessment cases the use of the cost to ascertain an increase in market value "operates effectively to bring about fair and equitable results." Id. 379 A.2d at 450-451.

Applying Bekkedal and McNally to our case, Germantown's assessment scheme is unconstitutional on either basis. First, the Reserve Capacity Assessment is designed to collect more than the cost of reserve capacity (the work assessed).

Germantown expects to collect $4,905,641 through the reserve capacity assessment scheme over a 27 year period. Appellants have determined the total assessments collected could amount to $8,238,000 (not including accrued interest). The cost of reserve capacity is only $614,944.26. Clearly, the total assessment is greater than the total cost of the work assessed. Thus, the assessment is an unconstitutional taking of property.

Secondly, the Reserve Capacity Assessment scheme is designed to exact from each Appellant more than the enhanced value accruing to their individual property. Appellants presented sufficient evidence that the cost of the reserve capacity equaled $614,944.26. See Argument, at pp. 26-30. The cost of the reserve capacity is the only evidence of the enhanced value to the assessed

properties. No other proof was proffered by Germantown to show the enhanced value. Under McNally, the enhanced value to the assessed properties is equal to the cost of reserve capacity. Accordingly, the total reserve capacity assessments must be limited to the total enhanced value amount of $614,944.26. Any other result would be unconstitutional. Clearly Germantown intends to collect at least $4,905,641 through reserve capacity assessments. The $1,000.00 REC assessment is based upon the $4,905,641 figure when it should be based upon the $614,944.26 figure. The Reserve Capacity Assessment should be no greater than the enhanced value of $74.65 per REC ($614,944.26/8,238 REC's). Germantown's $1,000 per REC assessment is unconscionably greater than the enhanced value of $74.65 per REC. The Reserve Capacity Assessment does not bear a

substantial relationship to the cost of building reserve sewage flow capacity for future users. Thus, Germantown unconstitutionally overassessed Appellants by creating a special assessment which substantially exceeds the enhanced value.

Germantown's assessment scheme constitutes a taking of private property without just compensation in violation of the 14th Amendment. U.S. Const. amend. XIV. The reserve capacity assessment is constitutionally infirm and must be struck down as arbitrary, unreasonable and unconstitutional.

CONCLUSION

Based on the arguments made herein, this Court should find that the cost of the reserve capacity is $614,944.26, find that the Reserve Capacity Assessment unreasonably exceeds the cost of reserve

capacity, conclude that the assessment scheme is unreasonable, arbitrary and unfair, annul Germantown Resolution No. 11-88 as it affects Appellants, order refunds of assessments paid by Appellants, and discharge the liens on Appellant's properties.

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Wisconsin Statutes Section 66.60 Special assessments and charges.

(1) (a) Except as provided in sub. (6m), as a complete alternative to all other methods provided by law, any city, town or village may, by resolution of its governing body, levy and collect special assessments upon property in a limited and determinable area for special benefits conferred upon such property by any municipal work or improvement; and may provide for the payment of all or any part of the cost of the work or improvement out of the proceeds of such special assessments.

(b) The amount assessed against any property for any work or improvement which does not represent an exercise of the police power shall not exceed the value of the benefits accruing to the property therefrom, and for those representing an

exercise of the police power, the assessment shall be upon a reasonable basis as determined by the governing body of the city, town or village.

(2) Prior to the exercise of any powers conferred by this section, the governing body shall declare by preliminary resolution its intention to exercise such powers for a stated municipal purpose. Such resolution shall describe generally the contemplated purpose, the limits of the proposed assessment district, the number of instalments in which the special assessments may be paid, or that the number of instalments will be determined at the hearing required under sub. (7), and direct the proper municipal officer or employe to make a report thereon. Such resolution may limit the proportion of the cost to be assessed.

(3) The report required by sub. (2) shall consist of:

(a) Preliminary or final plans and specifications.

(b) An estimate of the entire cost of the proposed work or improvement.

(c) An estimate, as to each parcel of property affected, of:

1. The assessment of benefits to be levied.

2. The damages to be awarded for property taken or damaged.

3. The net amount of such benefits over damages or the net amount of such damages over benefits.

(d) A statement that the property against which the assessments are proposed is benefited, where the work or improvement constitutes an exercise of the police power. In such case the estimates

required under par. (c) shall be replaced by a schedule of the proposed assessments.

* * *

(11) If the cost of the project shall be less than the special assessments levied, the governing body, without notice or hearing, shall reduce each special assessment proportionately and where any assessments or instalments thereof have been paid the excess over cost shall be applied to reduce succeeding unpaid instalments, where the property owner has elected to pay in instalments, or refunded to the property owner.

* * *

(12)(e) An appeal under this subsection shall be the sole remedy of any person aggrieved by a determination of the governing body, whether or not the improvement was made according to the plans and specifications therefor, and

shall raise any question of law or fact, stated in the notice of appeal, involving the making of such improvement, the assessment of benefits or the award of damages or the levy of any special assessment therefor. The limitation provided for in par. (a) shall not apply to appeals based upon fraud or upon latent defects in the construction of the improvement discovered after such period.

* * *

(15) Every special assessment levied under this section shall be a lien on the property against which it is levied on behalf of the municipality levying same or the owner of any certificate, bond or other document issued by public authority, evidencing ownership of or any interest in such special assessment, from the date of the determination of such assessment by the governing body. The governing body

shall provide for the collection of such assessments and may establish penalties for payment after the due date. The governing body shall provide that all assessments or instalments thereof which are not paid by the date specified shall be extended upon the tax roll as a delinquent tax against the property and all proceedings in relation to the collection, return and sale of property for delinquent real estate taxes shall apply to such special assessment, except as otherwise provided by statute.

* * *

Wisconsin Statutes Section 144.24

Financial Assistance Program; point source pollution abatement.

(4)(b)3. The amount of reserve capacity for treatment works eligible for grant assistance is limited to that future capacity required to serve the users of

the treatment works expected to exist within the service area of the project 10 years from the time the treatment works are estimated to become operational or, in the case of interceptor sewers and associated appurtenances, the estimated date of operation. The department, in consultation with the demographic services center in the department of administration uynder §16.96, shall promulgate rules defining procedures for projecting population used in determining the amount of reserve capacity.

NR 128.06 Funable capacity. The fundable capacity of treatment works shall be determined as follows:

(1) The fundable capacity of sewage treatment facilities and sewage collection systems exclusive of interceptor sewers shall be that capacity necessary to treat

the projected flows 10 years from the estimated date that they will begin operation. The fundable capacity shall not include capacity for present and future flows from industrial users as defined in § NR 128.03(10).

(2) The fundable capacity for interceptor sewers shall be that capacity necessary to transport the projected flows expected to exist on the date the interceptor is estimated to become operational. The fundable capacity may not include capacity for transporting present and future flows from industrial users as defined in § NR 128.03 (10).

NR 128.07 Cost of fundable capacity. The estimated cost of step 3 construction of treatment works to transport and/or treat the fundable capacity shall be determined as follows. The facilities plan shall

provide parallel cost estimates for treatment works designed to treat the fundable capacity as well as for treatment works designed to treat the actual proposed design capacity. The actual design capacity shall be determined in accordance with §§ NR 110.09 (2)(j) and 110.10 (2). The ratio of these costs estimates shall be multiplied by the total step 3 eligible cost to obtain the cost of fundable capacity.

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